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Discrimination against Women in Employment in Higher Education

Alan Miles Ruben

Betty J. Willis

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> As an institution, . . . [the university] looks far into the past and far into the future, and is often at odds with the present. It serves society almost slavishly—a society it also criticizes, sometimes unmercifully. Devoted to equality of opportunity, it is itself a class society.
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> —Clark Kerr, THE USES OF THE UNIVERSITY 19 (1963).

AT THE SUMMIT of the social system, like some multi-nucleated hypothalamus, the institutions of higher learning exert pervasive and decisive influence on the direction and rate of change which we are pleased to call progress. It is the universities, particularly the professional schools, which serve as the vehicles for upward social mobility. Yet for all their reformist influence upon the general fabric of our era educators have directed predictably little critical examination at the universities' own internal affairs. Colleges are no exception to the maxim that all institutions tend to be defensive about their own practices however laggard behind the policies they publicly promote.

Having been forced to adjust the structure of academic governance and the design of the curriculum responsively to large-scale student protest, it now appears that universities will have to rework their traditional patterns for the appointment, compensation and promotion of faculty and administrative staff to satisfy the demands being made by the women's liberation movement for an end to sexist employment practices.

Today, the four women in ten who seek vocational outlets for their talents in lieu of an all-encompassing family life (some 29 million in 1968) constitute more than 37 percent of the labor force. Most are skillfully manipulated, however, into "acceptable" careers chiefly as clerks, and, at a higher level, as school teachers and nurses.[1] Barriers in the form of admission quotas, denial of scholarship aid and the lack of professional women with whom to identify reinforce the socially blessed dogma that "women's place is in the home" and so operate to discourage women from other careers requiring a graduate degree.[2]

The interplay of these psychological and social forces have resulted in a pronounced disparity in educational attainment between the sexes. In 1967 only 50 percent of girls graduating from high school enrolled at

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* Associate Professor of Law, Cleveland State University College of Law.

** J.D., Geo. Wash. U.; M.B.A., U. of Penn.

[1] 1969 HANDBOOK ON WOMEN WORKERS, Bulletin 294, Women's Bureau, U.S. Dept. of Labor (1969) pp. 9-10, 94-100, 116. [hereinafter referred to as HANDBOOK—1969.]

[2] Weisstein, *"Kinder, Kuche, Kirche" as Scientific Law: Psychology Constructs the Female*, printed in *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the Committee on Education and Labor*, 91st Cong., 2nd Sess., Part I, at 286-292 (1970) [hereinafter referred to as *"Hearings, Part I"*].

a college in contrast to 71 percent of their male classmates.[3] While it is true that more women are earning college degrees than ever before, the disparity between the sexes has been widening. In 1940, 3.7 percent of women and 5.4 percent of men, age 25 and over, had completed a four year college education. By 1967 the respective statistics were 7.6 percent for women and 12.8 percent for men.[4]

The influence of these pressures persist in graduate education. In programs beyond the baccalaureate degree in 1967 only 30 percent of the 900,000 students registered were female.[5] At the doctorate level—the prime market from which college faculty are recruited—only 12 percent of the degrees conferred in 1967 were earned by women; a decrease of 3 percent from the proportion achieved in 1930.[6]

The pattern emerging from these statistics shows undeniably an ever declining proportion of women represented at each step of the educational pyramid.

Not only have women been under-represented in higher education but their courses of study have been concentrated within a narrow range. Thirty eight percent of the bachelor's degrees awarded to women in 1967 were in education, accounting for 75 percent of all such degrees conferred in this field. In contrast less than 3 percent of the first degrees earned by women were in business and commerce.[7]

Turning to professional education, the status of women is even more starkly limited. Women held only 7 percent of the first professional degrees in medicine awarded in 1967 and less than 4 percent of those conferred in law.[8]

The net effect of the "sex gap" in higher education has been to restrict both the number of women qualified to serve on university faculty and staff and their areas of vocational competence. Yet, even so, the number, rank, and compensation of females actually employed in higher education have been so significantly less than expected as to warrant the conclusion of widespread, deliberate discrimination.[8a]

Rarely are the charges of calculated anti-female bias in higher education which are levelled by women's groups supported by reference to written personnel policies or testimony as to instructions given by university officials. Nor is it seriously contended that there exists some great silent college conspiracy to deny women equal faculty opportunities.

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[3] Osofsky and Feldman, *Fact Sheet on Women* (1971), printed in *Hearings, Part I,* at 129-130.

[4] *Id.*

[5] HANDBOOK—1969 at 190.

[6] *Id.* at 191.

[7] *Id.* at 193-94.

[8] *Id.* at 195.

[8a] *See,* A MATTER OF SIMPLE JUSTICE, THE REPORT OF THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES (1970) (Reprinted in *Hearings, Part I,* at 37-41), F. Newman, Ch., REPORT ON HIGHER EDUCATION, April 1, 1971 (unpublished).

The professional woman seeks employment until normal retirement age. 71 percent of all women with 5 years or more of college are in the labor force and participation is almost as strong for married professionals as for those without husbands. HANDBOOK—1969 at 205-206.

Rather it is suggested that prejudice against the female scholar or administrator prevails as a result of deep-seated feelings about the role of women in society and the propriety of their competing with males for the sought after positions held by male members of faculty peer groups which powerfully affect, if not control, the employment relationship. That such influences are effectively at work appears from a statistical analysis of the employment posture of women at colleges and universities.

In 1964 only 22 percent of the faculty and professional staff in institutions of higher learning were women. Rather than progress this statistic signifies a decline in the proportion of females among college teachers. One must go back to 1910 before women can be shown to have accounted for so small a segment of the academic profession.[9]

Not only are qualified women not employed proportionately to their number in academia, but those who are appointed tend to be found primarily in the lowest professional ranks. As may be observed from the following table,[10] drawn from experience at twenty universities, women are habitually used as cheap, transient labor in the untenured ranks of instructor and assistant professor and are almost invisible in the professorial rank.

Rank	*Percent Women in Rank*
Professor	4.7
Associate Professor	10.1
Assistant Professor	10.4
Instructor	16.1

The scarcity of women generally on university faculties and the concentration of those so employed in the lower tier of positions is accompanied, the same study demonstrates, by their confinement, in the main, to the departments of education and home economics[11] as shown in the following table:

Department	*Percent of Women on Instructional Staff*
Physical Sciences	2.0
Biological Sciences	6.8
Social Sciences	4.5
Humanities	9.9
Education	23.8
Home Economics	86.4

Under-representation of women is perhaps most pronounced on boards of trustees and in policy-level administrative positions in the co-educational collegiate hierarchy where, according to a member of the

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[9] *Id.* at 98. In 1940 women held 28% of faculty posts in higher education. *Id.*

[10] Based on 1960 data compiled from employment records of 20 leading universities by Dr. Jessie Bernard and reported in BERNARD, ACADEMIC WOMEN, 190-191 (1966). The broader study of the National Education Association for 1965-66, cited note 13 *infra*, also supports this conclusion. *See also*, Women's Bureau, U. S. Dept. of Labor, Fact Sheet on the Earnings Gap, at 1 (1970).

[11] *Id.* at Table 10/1.

Pennsylvania Human Relations Commission, they are "virtually nonexistent." [12] With the merger of the traditional post of Dean of Women into the newly created position of Dean of Student Affairs on campuses across the country opportunities for women in administration are being further curtailed.

Hand in hand with the limitation of the university employment market for females is the underpayment of their salaries. The National Education Association reports that at every level the annual compensation of women is less than that of men of equal rank and experience.

MEDIAN ANNUAL SALARIES OF TEACHING STAFF IN COLLEGES AND UNIVERSITIES, BY SEX, 1965-66[13]

	Number		*Median Annual Salary*	
Teaching staff	*Women*	*Men*	*Women*	*Men*
Professors	3,149	32,873	11,649	12,768
Associate professors	5,148	28,892	9,322	10,064
Assistant professors	8,983	37,232	7,870	8,446
Instructors	9,454	19,644	6,454	6,864
Total	26,734	118,641	$ 7,732	$ 9,275

The message of these aggregate statistics can perhaps best be understood when personalized for individual institutions. Ohio boasts one of the nation's 10 largest private universities, as measured by value of endowment, Case Western Reserve University, and one of the 10 largest public universities, from the standpoint of enrollment, Ohio State University.[14]

Case Western Reserve University exemplifies the gloomy picture for women with only three women trustees out of fifty (none on the governing body, the Executive Committee), less than 14 percent of the total faculty female, only 8 percent of the female faculty holding a rank above assistant professor, and with just three women administrators out of thirty eight (not one in a policy-making position). Additionally, there are presently no females on either the engineering school or the law faculties, only one female instructor on the school of management faculty, only one female professor in the medical school, and only ten female professors in the department of arts & sciences, at least half of whom were hired originally to teach at Mather College for Women. In point of fact no female has been hired on the English Department faculty since 1950. This information is summarized in Table I.

The restricted employment opportunities for women at this campus is underscored by the fact that a significant percentage of the feminine members of the faculty, especially those above the rank of assistant professor were "inherited" as a result of the merger of Mather College for Women and Adelbert College for Men when Western Reserve University was formed two decades ago.

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[12] Testimony of Wilma Scott Heide, *Hearings, Part I*, at 132.

[13] NATIONAL EDUCATION ASSOCIATION, SALARIES IN HIGHER EDUCATION, 1965-66. RESEARCH REPORT 1966-R 2.

[14] EDUCATION DIRECTORY, 1969-1970, HIGHER EDUCATION, NAT'L CENTER FOR EDUCATIONAL STATISTICS, U.S. DEPT. OF H.E.W., OFFICE OF EDUC.

The posture of women at Ohio State University is strikingly similar. They account for only 19 percent of the total faculty of 3004. While 36 percent of all instructors are female, their limited promotion potential is shown by the fact that only 20 percent of assistant professors, 14 percent of associate professors and 6 percent of professors are women.[15] The status of women by academic rank and department is depicted in Table II on page 478.

An "in house" task force created to study the status of women at Ohio State reported

> Data indicated that women at The Ohio State University lacked significant representation in most major areas throughout the University. While women comprised 38% of the total work force, they did not have equal status with men at all levels and in all realms of University activity. This problem was observed to be particularly acute in such areas as top level administrative and professional posts and in the instructional and research staff. Evidence showed that women were under-represented in these areas and, in general, held positions with little power involving critical decision-making.[16]
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> This view was enhanced by the fact that at The Ohio State University as of February 1, 1971, there were no women serving in positions of Vice Presidents or Deans, or in any of the top administrative policy making positions.[17]
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> [Concerning faculty salaries], in summary, for twenty within departmental comparisons women were paid lower salary in every instance.[18]

Neither enlightened university leadership nor private pressures have succeeded in enlarging the role of women in higher education. The failure of voluntarism means that if women are to be assured equal employ-

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15 REPORT OF THE OHIO STATE UNIVERSITY AD HOC COMM. ON THE STATUS OF WOMEN 68 (1971).

16 *Id.* at 83.

17 *Id.* at 87.

18 *Id.*, Supp., J, K, L-3. Comparable studies undertaken at a number of other institutions reaching similar conclusions are reported in *Hearings, Parts I, II. E.g.*, Univ. of California (Berkley) 1143; Univ. of Illinois, 1225; Univ. of Maryland, 1024; Univ. of Chicago, 753.

TABLE I

CASE WESTERN RESERVE UNIVERSITY

Number of Women (Men) on Faculty by Rank

	Prof.	Assoc. Prof.	Asst. Prof.	Lecturer	Instructor	Associates	Fellows & Trainees	Demonstrators	Total	Percentage
Arts & Sciences	10(115)	10(101)	29(133)	1(0)	15(20)	0(2)			65(371)	13(87)%
Applied Social Sciences	4(3)	3(2)	8(4)	5(8)	10(2)	—			30(19)	61(39)%
Dentistry	0(17)	0(19)	0(59)	0(3)	2(74)	3(20)	0(4)		5(196)	2(98)%
Engineering	0(31)	0(37)	0(22)	0(4)	—	—			0(94)	0(100)%
Law	0(9)	0(8)	0(2)	0(18)	—	—			0(37)	0(100)%
Library Science	1(5)	4(1)	1(2)	—	1(1)	—			7(9)	44(56)%
Management	0(13)	0(9)	0(11)	0(19)	1(8)	—			1(60)	2(98)%
Medicine	1(83)	6(135)	32(419)	—	48(371)	15(51)	17(144)	20(86)	139(1289)	9(92)%
Nursing	6(0)	13(1)	39(1)	4(0)	27(0)	—			89(2)	2(98)%
Total	22(276)	36(313)	109(653)	10(52)	104(467)	18(73)	17(148)	20(86)	336(2077)	14(86)%
Percentage	7(93)%	10(90)%	14(86)%	16(84)%	18(82)%	19(81)%	10(90)%	19(81)%	14(86)%	

Data obtained from 1969-1970, 1970-1971 catalogues. Includes clinical faculty. Total may include double counts for those holding appointments on more than one faculty.

TABLE II
OHIO STATE UNIVERSITY
Number of Women (Men) on Faculty by Rank

	Full Prof.	Assoc. Prof.	Asst. Prof.	Lecturer	Instructor	Total	Percentage
Administrative Sciences	1(95)	7(48)	8(54)	—	1(1)	17(198)	8(92)%
Agriculture & Home Economics	23(187)	22(100)	16(100)	—	16(49)	77(436)	15(85)%
Arts	3(39)	11(41)	12(27)	—	—	26(107)	11(89)%
Behavioral Sciences	6(106)	8(45)	3(78)	—	—	17(229)	7(93)%
Biological Sciences	0(104)	2(44)	3(41)	—	—	5(189)	3(97)%
Dentistry	4(24)	1(26)	1(55)	0(9)	12(52)	18(166)	10(90)%
Education	14(89)	18(41)	18(41)	—	11(14)	61(185)	25(75)%
Engineering	0(153)	0(84)	0(70)	—	0(6)	0(313)	0(100)%
Humanities	5(72)	6(39)	14(60)	—	—	25(171)	12(88)%
Law	1(23)	0(6)	0(1)	—	—	1(30)	3(97)%
Mathematics & Physical Sciences	0(100)	4(48)	3(71)	—	—	7(219)	3(97)%
Medicine	4(145)	8(158)	17(274)	—	21(247)	50(824)	6(94)%
Nursing	4(0)	14(0)	22(0)	—	20(0)	60(0)	100(0)%
Allied Med. Prof.	3(10)	7(6)	14(2)	—	20(13)	44(31)	59(41)%
Optometry	0(4)	0(3)	0(8)	0(1)	1(32)	2(48)	4(96)%
Pharmacy	0(10)	0(11)	1(9)	—	3(9)	4(39)	9(91)%
Veterinary Medicine	0(29)	0(12)	1(16)	—	2(9)	3(66)	4(96)%
Total	68(1290)	108(712)	133(907)	0(10)	107(432)	417(3251)	11(89)%
Percentage	5(95)%	13(87)%	13(87)%	0(100)%	20(80)%	11(89)%	

Data obtained from the Ohio State University Bulletin 1-5, 6-14 (1970/71). Includes clinical faculty and emeriti-ae. Totals may include double counts for those holding appointments on more than one faculty.

ment opportunity in higher education it must come as a result of government sanction.

In the succeeding pages we will explore three possible remedies which may be pursued to end sexist policies on our nation's campuses:

1. Title VII of the Civil Rights Act of 1964, and counterpart state Fair Employment Practices legislation;
2. The Fourteenth Amendment and the Civil Rights Act of 1866; and
3. The federal contract compliance program.

Equal Employment Opportunity Under the Civil Rights Act of 1964 and State Fair Employment Practice Acts.

For women, Magna Carta properly dates from 1964 rather than 1215. In that year, the Civil Rights Act declared as a matter of national policy that discrimination in employment against an individual on account of sex was unlawful.[19]

Unhappily, however, the act does not apply either to educational institutions "with respect to the employment of individuals to perform work connected with the educational activities of such institution[s]" [20] or to state and municipal universities with respect to the employment of all individuals regardless of the nature of their work.[21] Although amendments seeking to close these loopholes have been introduced,[22] at this writing higher education remains one of the last major bastions where male supremacist practices, at least in the area of faculty selection, can continue to operate within the law. The act is not, however, totally without application to university employment. Arguably, the non-teaching administrative and professional staff of private colleges still fall within its penumbra. The legislative history offers no clues as to the scope of the "educational activities" exclusion and there are thus far no judicial interpretations of it. One author suggests that because no "strictly objective standard for appointment, granting of tenure, and advancement can be enunciated," Congress believed the judgments exercised with regard to faculty personnel actions must, of necessity, be "delicate" and not readily subject to evaluation for bias.[23] Yet, it is questionable whether the judgments are any more subjective or sensitive than in the case of other professionals and managers who are not so exempted under the act.

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19 42 U.S.C. § 2000(e) *et seq.* (1964). *See,* L. KANOWITZ, WOMEN AND THE LAW 103-6 (1968). The Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1964), amends the Fair Labor Standards Act to require that covered employees receive equal pay for equal work regardless of sex. However, both the act and the counterpart legislation in two-thirds of the states exempt administrative, executive and professional personnel.

20 42 U.S.C. § 2000e-1 (1964). Just how the educational exemption came to have been incorporated in the act remains an enigma. There is no legislative history on the subject and the passage first appears in The Dirksen-Mansfield sponsored Substitute for the House-passed version of the Act. H.R. 7152, amendment No. 656, May 26, 1964, Senate Calendar 854 at 74. Precedent may be found, however, in some antecedent state Fair Employment Practices Acts.

21 42 U.S.C. § 2000(e)(b) (1964).

22 *E.g.* H.R. 16098, § 805, 91st Cong., 2nd Sess. (1970).

23 Benewitz, *Coverage Under Title VII of the Civil Rights Act,* 17 LABOR L. J. 285, 290-91 (1966).

An alternate hypothesis might be advanced that the exclusion was designed to avoid interference in the operations of "single sex" colleges and in the teaching of physical education classes where pupils and instructors are traditionally sex-segregated. In the absence of a definitive rationale, it would appear inappropriate to interpret the exclusion broadly.

The Equal Employment Opportunity Commission, responsible for administering the act,[24] has thus far viewed the exclusion narrowly by asserting jurisdiction over the complaint of an office manager in the admissions office of a private university that her wages were discriminatorily lower than males holding equivalent positions,[25] the similar charge of a "Director of Study and Data Gathering" responsible for the assembly and interpretation of data for use in program development and leadership training at a church-related college[26] and the complaint of a non-professional library assistant[27] despite assertions from each of the responding institutions that the "pedagogical exclusion" barred Commission action.

The effectiveness of the agency proceeding, where it is available, is another matter. The rigid time limitations built into the act require a complainant to notify the EEOC within 90 days of the alleged discriminatory action.[28] If a state or municipal agency has concurrent jurisdiction over the charge the complainant is obliged to refer the matter first to it and may not invoke the processes of the EEOC for 60 days thereafter.[29] Finally, if neither the state commission nor the EEOC have been successful in resolving the controversy, the complainant is empowered to institute a civil action within 30 days after receipt of a letter-notice from the EEOC.[30] The Commission's authority is limited to efforts at conciliation and persuasion[31] and its toothless bite has admittedly handicapped its enforcement of the statutory policy with respect to the 11,000 sex discrimination charges which made up one quarter of its total docket[32] during the first four years of its existence.

The necessary commitment of substantial time and money to litigation, the expectably long delay between commencement and outcome,[33]

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[24] 42 U.S.C. § 2000e-5 (1964).

[25] EEOC, Dec. No. 70-405 (Jan. 19, 1970), CCH EMPLOYMENT PRACTICES GUIDE ¶6106.

[26] EEOC, Dec. No. 71-1102 (Dec. 31, 1970), CCH EMPLOYMENT PRACTICES GUIDE ¶6200.

[27] EEOC, Case No. CH 68-2-539E (May 7, 1969), CCH EMPLOYMENT PRACTICES GUIDE ¶6126.

[28] 42 U.S.C. § 2000e 5(d) (1964). Where a state enforcement agency exists the charge must be filed with the EEOC within 30 days after notice that the local agency has ended its proceedings but not later than 210 days from the occurrence.

[29] 42 U.S.C. § 2000e-5(b) (1964).

[30] 42 U.S.C. § 2000e-5(e) (1964).

[31] 42 U.S.C. § 2000e-5(a) (1964).

[32] Testimony of William H. Brown III, Chairman, Equal Employment Opportunity Comm'n, *Hearings Part II on H.R. 16098 Before the Special Subcomm. on Education, Comm. on Education and Labor*, 91st Cong., 2nd Sess. at 623, 629 (1970) [hereinafter referred to as *Hearings, Part II*].

[33] The EEOC simply lacks capacity to process promptly the charges filed with it. Investigations may begin about 5 months after a complaint has been filed and conciliation efforts may drag out another year and a half. *Hearings on Appropriations for 1970 Before the Subcomm. on the Departments of State et al., of the House Comm. on Appropriations*, 91st Cong., 1st Sess., pt. 4 at 384 (testimony of Chairman

(Continued on next page)

the uncertainty of a fully compensatory recovery[34] and the potential endangering of one's career because of the disfavor with which a suit against a university is generally received in the academic community combine to discourage aggrieved individuals from pursuing their rights in court. In only ten per cent of the approximately 8000 "reasonable cause" cases in which EEOC conciliation was unsuccessful were suits subsequently filed against respondent employers.[35]

Although the Attorney General is authorized to bring an action directly in the name of the government whenever the discrimination takes the form of a "pattern or practice," [36] it was not until July, 1970, that the first sex suit was filed, and, in view of the Department of Justice's restricted resources, this enforcement mechanism would seem to be of limited vitality.[37]

Turning from the federal act to consider state and local Fair Employment Practice legislation, one finds no less bleak prospects to redress sex discrimination in higher education. The agencies of only 26 states claim jurisdiction over both private and public universities while the authority of 5 others is limited to private institutions.[38] Fur-

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(Continued from preceding page)

Alexander) (1969); *Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 91st Cong., 1st Sess. (1969); Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Elucidation,* 8 DUQUESNE L. REV. 1, 14, (1970). Of course, a complainant may sixty days after the EEOC's investigatory period begins, file a civil action without waiting for the administrative process to run its course. 42 U.S.C. § 2000e-5(e) (1964); 29 C.F.R. § 1601.25a(a) (1971)*. *See also* 42 U.S.C. § 2000e-5(e) (1964) (court has discretion to stay proceedings for another 60 days if EEOC efforts are still in progress).

[34] Appointment of counsel and award of counsel fees at the discretion of the court are provided in 42 U.S.C. §§ 2000e 5(e) and (k) (1964). Relief in the form of "affirmative action" and back-pay is also available 42 U.S.C. § 2000e-5(g) (1964).

[35] *Hearings, Part II* at 629.

[36] 42 U.S.C. § 2000e-6(a) (1964). The Department may intervene in private actions as well. 42 U.S.C. § 2000e-5(e) (1964).

[37] *Hearings, Part II* at 635-36; *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1230-32 (1971).

[38] States having agencies with jurisdiction over private and public colleges: ARIZ. REV. STAT. ANN. § 41.1461*; COLO. REV. STAT. ANN. ch. 80, art. 21-2(5); CONN. GEN. STAT. ANN. ch. 563 § 31-122(f); FLA. STAT. ANN. § 112.41(1)*; HAWAII REV. STAT. tit. 21 § 378(4); IDAHO CODE § 67-5902(6)*; IND. ANN. STAT. § 22-9-1-1; IOWA CODE ANN. § 105A.2(5)*; KAN. STAT. ANN. § 44-1002(b)*; MD. ANN. CODE art. 49 B, §§ 17, 20 (educational activities exemption); ANN. LAWS OF MASS. ch. 151B § 1.5; MICH. COMP. LAWS ANN. § 423.302(b); MINN. STAT. ANN. § 363.01; ANN. MO. STAT. ch. 296 § 291.010(3) (Vernons); REV. CODE OF MONT. tit. 64, ch. 3 § 64.302(a); REV. STAT. OF NEB., ch. 48, art. 11, § 48.1102(2); NEV. REV. STAT. ch. 613 § 310.1; N. M. STAT. ANN. § 4-33-2B*; N.Y. EXEC. LAW § 292-5 (McKinney); OKLA. STAT. ANN. tit. 25 § 1101*; PA. STAT. ANN. tit. 43 § 954(b); UTAH CODE ANN. § 34-35-2(5)*; VT. STAT. ANN. tit. 21, sub. 6 § 495(5); REV. CODE OF WASH. § 49.60.040 (*quare* whether applicable to public employers); W. VA. CODE ANN. ch. 5 art. 11 § 3d; WYO. STAT. ANN. ch. 13 § 27.258(2). * —see 1971 Supplement.

States having agencies with jurisdiction over private colleges only:

ALASKA STAT. § 18.80.300(3); CAL. LABOR CODE § 1413(g).10; N.H. REV. STAT. § 354-A:2(5); N.J. STAT. ANN. tit. 10 § 5(e)*; ORE. REV. ST. § 659.010(6).

Several states have legislation requiring that women be paid "equal pay for equal work." *E.g.*:

ARK. STAT. ANN. ch. 6 § 81-624; ILL. ANN. STAT. ch. 48 § 4A; KY. REV. STAT. § 337.420 (2); ME. REV. STAT. ANN. tit. 26 § 628; N.D. CENT. CODE ch. 34-06.1*; OHIO REV. CODE ANN. § 4111.17A; GEN. LAWS OF R.I. tit. 28-6-18; S.D. COMPILED LAWS ANN. ch. 60-12 § 15; CIVIL STAT. OF THE STATE OF TEXAS ANN., tit. 117, art. 6825.

See Nat'l Conf. of Comm'r's on Uniform State Laws' Model Anti-Discrimination Act, 4 HARV. J. LEGIS. 212 (1967); Bonfield, *State Civil Rights Statutes: Some Proposals,* 49 IOWA L. REV. 1067 (1964); Bonfield, *Substance of American Fair Employment Practices Legislation I: Employers,* 61 NW. U. L. REV. 907 (1967).

thermore, the record of achievement by state agencies leaves much to be desired. Commentators and the EEOC itself have criticized local performance as ineffective.[39]

Understaffed, underbudgeted and under pressure, agencies of the states and their political subdivisions have not been able to play a major role in ensuring equality of treatment for the professional woman in the nation's universities.

Relief Under the Fourteenth Amendment and the Civil Rights Act of 1866 Against Employment Discrimination in Public Colleges and Universities.

The command of the Fourteenth Amendment prohibiting a state from denying to any person within its jurisdiction the equal protection of the laws is implemented under the Civil Rights Act of 1866 which affords an injured party a private remedy against "[e]very person who, under color of any statute . . . regulation . . . or usage, of any State . . . subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws. . . ." [40]

Vindication of feminine rights thus far under this legislation has met with something less than notable success. The difficulty has not been with any lack of recognition that women are "persons" entitled to "Equal Protection" but rather that sex, unlike race, has been thought to constitute a permissible basis for differentation in legislative treatment.[41] The "single sex school" issue aside,[42] however, there would appear to be no rational basis to support a limitation upon the employment of women in public co-educational institutions of higher learning and no such policy has been openly propounded. Proof of the requisite invidious discrimination by state educational officials then becomes the major concern of a section 1983 proceeding. Deliberations of faculty recruitment and promotion committee members or of university employment officers are not likely to be fruitful sources of evidence of unequal treatment; much less are published personnel guidelines apt to prove productive. The case usually will have to be made circumstantially by examination of the recruitment, compensation, promotion and termination practices and procedures and their application to the claimant personally or to the class she may attempt to represent.[43] In litigation

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[39] *See* SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 92-95 (1966); Note, *Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvement,* 5 COLUM. J. LAW & SOCIAL PROB., 1, 18 (1969); *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1212-1216 (1971). *See also,* Barone, *The Impact of Recent Developments in Civil Rights on Employers and Unions,* 17 LABOR L. J. 413 (1966); *Institutional Analysis of the Agencies Administering Fair Employment Practice Laws,* 42 N.Y.U. L. REV. 823 (1967).

[40] 42 U.S.C. § 1983 (1964).

[41] Mengelkoch v. Industrial Welfare Comm., 284 F. Supp. 950 (C.D. Cal. 1968), *vacated,* 393 U.S. 83 (1968) (California's protective legislation providing for maximum hours of work for women not violative of equal protection as unreasonable classification); Goesaert v. Cleary, 335 U.S. 464 (1948) (Michigan statute restricting licensing of females as bartenders valid).

[42] *See, e.g.,* Heaton v. Bristol, 317 S.W.2d 86 (Tex. Cir. App. 1958) *cert. denied,* 359 U.S. 230 (1959), cf. Kirstein v. University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970).

[43] *E.g.* Parham v. Southwestern Bell Tele., 433 F.2d 421 (8th Cir. 1970); Dobbins v. Local 212, International Bhd. of Electrical Workers, 292 F. Supp. 413 (S.D. Ohio 1968).

involving race discrimination the requirements of a *prima facie* case have been met by the plaintiff's introduction of statistical evidence from which courts have inferred that the defendant had engaged in prohibited conduct. The door was opened in a series of cases in which the absence of Negroes from jury panels over an extended period of time was taken as *prima facie* proof of a deliberate design to systematically exclude them.[44] This so called "rule of exclusion" was called into play when it was shown that Negroes constituted a substantial segment of the relevant population, that some were qualified for jury service but that none was ever called.[45] Proof of inequality in the number of Negroes selected, in itself, was not evidence of discrimination since "fairness in selection has never been held to require proportional representation of races upon a jury."[46] The door opened wider in the challenge to Macon County's voters' registration system mounted in *Alabama v. United States*.[47] There, it was established that although 83 percent of the county population was Negro, less than 10 per cent of voting age were registered to vote in contrast to virtually 100 percent of eligible white citizens. Noting that "statistics often tell much, and Courts listen," the circuit court held the disparity to be so great that it "could not exist by chance alone" but was presumptively the product of a conscious policy of racial discrimination in the administration of the registration system.[48] In both the jury impanelment and voter registration cases, selection procedures should have been "random and automatic." Any statistically significant discrepancy between the proportion of qualified members of the allegedly disfavored group and the proportion enrolled from the assertedly preferred group would thus suggest that discriminatory forces were at work.[49] This neat statistical inference from population data may be inappropriate, however, in an employment setting, where the modifying elements of personal qualification and interest in the job play a predominant role.[50] Nevertheless, one court has held that a showing of such a statistical difference was conclusive of discriminatory hiring practices[51] while another was at least willing to give it weight as "some indication that discriminatory forces, albeit subtle ones, may be afoot."[52] Amassing evidence of sexist personnel

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[44] *E.g.*, Akins v. Texas, 325 U.S. 398 (1945).

[45] Hernandez v. Texas, 347 U.S. 475, 478 (1954).

[46] Akins v. Texas, 325 U.S. 398, 403 (1945); Swain v. Alabama, 380 U.S. 202, 208-9 (1965).

[47] 304 F.2d 583, 586 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962).

[48] *Id.* at 586; *accord*, White v. Crook, 251 F. Supp. 401, 406 (M.D. Ala. 1966).

[49] Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970). *See also* Davis v. Cook, 80 F. Supp. 443, 451 (N.D. Ga. 1948) (disparity between wages received by white and negro teachers attributed to discrimination). *But see*, Reynolds v. Board of Public Instruction, 148 F.2d 754 (5th Cir. 1945), *cert. denied*, 326 U.S. 746 (1945).

[50] *Id.* at 1243. *See e.g., Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1152-1155 (1971); Note, *An American Dilemma—Proof of Discrimination*, 17 U. CHI. L. REV. 107, 120-125 (1949).

[51] Parham v. Southwestern Bell Tel., 433 F.2d 421 (8th Cir. 1970).

[52] Penn. v. Stumpf, 308 F. Supp. 1238, 1243 (N.D. Cal. 1970); *cf.* Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); United States v. Hayes Int'l Corp., 415 F.2d 1038 (5th Cir. 1969); United States v. United Ass'n of Journeymen, 314 F. Supp. 160 (S.D. Ind.

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policies in the filling of administrative posts poses no greater challenge in higher education than it does in industrial employment, and the groundwork has already been laid for the proving of discrimination in faculty hirings in a number of studies presented to the Office of Federal Contract Compliance for action under Executive Order No. 11246,[53] as amended, by Executive Order No. 11375.[54] At a time when universities are experiencing a financial pinch and enrollment pressures appear to have crested, sex discrimination takes on a new dimension for women currently employed in higher education. They are vulnerable targets under "cut-back and attrition programs" either because they lack seniority in staff jobs or because they lack tenure in academic posts. Yet, section 1983 may provide them with a special protection. Thereunder a public educational institution having a history of *racially* discriminatory employment practices may not terminate the services of an academic employee for economic reasons where the employee is a member of the class against whom the discrimination operated, even though the employee's services were otherwise terminable at will and even though the termination was effected pursuant to a non-discriminatory procedure. In such a case the school is required to afford the teacher an opportunity to have his qualifications comparatively evaluated according to objective standards and procedures against those of all employees performing similar functions to determine which instructors are to be retained.[55]

In *Smith v. Board of Education*,[55a] mandated integration of a segregated school district had led to the closing of formerly all Negro schools. When there were no longer vacancies at the remaining schools, unabsorbed teachers of the closed schools were, in accordance with traditional practice, dismissed. Holding that "standards of placement cannot be given application to preserve an existing system of imposed segregation," the court enjoined enforcement of the school board's "consolidation policy . . . where the effect is to impose . . . the heavy burden of unemployment solely upon those whose rights were violated. . . ." [56]

Although we are presently concerned with discrimination which is sex-linked rather than race related, no constitutional difference arises;

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1969). *See also*, Cameron Iron Works, Inc. v. Equal Employment Opportunity Comm'n, 320 F. Supp. 1191 (S.D. Tex. 1970) (showing that less than 1% of the Company's white collar workers were black and less than 2% were Mexican-Americans was sufficient to warrant order granting Commission's motion for production of company documents). *But cf.* Lewis v. City of Grand Rapids, 356 F.2d 276, 789-90 (6th Cir.) *cert. denied*, 385 U.S. 838 (1966); United States v. Local 36, Sheet Metal Workers Int'l Ass'n, 280 F. Supp. 719, 728-29 (E.D. Mo. 1968).

[53] 3 C.F.R. 339 (1964-1965). *See Hearings—Part II* at p. 1261 for a list of the universities which have been the subject of such evaluative studies or formal complaints.

[54] 3 C.F.R. 320 (1967). *See* 42 U.S.C. § 2000e (Supp. V, 1970).

[55] Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966).

[55a] *Id.*

[56] *Accord*, Rolf v. County Bd. of Ed., 391 F.2d 77 (6th Cir. 1968); Hill v. Franklin County Bd. of Educ., 390 F.2d 583 (6th Cir. 1968); Wall v. Stanly County Bd. of Educ., 378 F.2d 275 (4th Cir. 1967); Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966).

the Fourteenth Amendment speaks equally against violations of the rights of women.[57]

If it can be shown that a public university has followed a settled policy of discrimination against women in employment which has resulted in female professionals being the last hired, the first fired and the most overlooked in promotions, any member of the class against whom this discrimination has operated would appear entitled to claim the right of having her qualifications comparatively evaluated against all the members of the institution similarly situated to determine who will be affected by an economic cut-back.

Section 1983 is available, of course, only where the complained of sex discrimination constitutes "state action." [58] Clearly within its ambit are the state and municipal universities. There is also, however, a growing body of judicial opinion and academic comment holding that even an ostensibly private educational institution operating under state charter, license and regulation, carrying out an important public function, benefitting from state tax exemption and receiving state funds so involves the state in its activities that, at least where discrimination is alleged, the institution's acts are those of the state.[59]

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[57] Seidenberg v. McSorley's Old Ale House, Inc., 308 F. Supp. 1253 (S.D.N.Y. 1969); Kirstein v. University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970). *But cf.* Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970).

Courts are divided over whether actions arguably cognizable under Title VII must be brought under the procedure specified in the Civil Rights Act of 1964 rather than pursuant to §§ 1983 and 1981 of the 1866 Act. *Compare* James v. Ogilvie, 310 F. Supp. 661 (N.D. Ill. 1970) and Young v. Int'l Tel. and Tel. Co., 438 F.2d 757 (3rd Cir. 1971) *with* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1971).

[58] United States v. Price, 383 U.S. 787, 794 n. 7 (1966).

[59] Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965).

Cf. "Tuition Grant" cases: Poindexter v. Louisiana Financial Assistance Comm., 275 F. Supp. 833 (E.D. La., 3-judge, 1967), *aff'd per curiam*, 389 U.S. 571 (1968); C. A. Brown v. South Carolina State Bd. of Ed., 296 F. Supp. 199 (D.S.C. 3-judge, 1968), *aff'd per curiam*, 393 U.S. 222 (1968); Griffin v. State Bd. of Ed., 296 F. Supp. 1178 (1969).

See also, Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967) aff'd, 392 F.2d 120 (3rd Cir. 1968), *cert. denied*, 391 U.S. 921; Guillory v. Tulane University, 203 F. Supp. 855 (E.D. La.), *vacated*, 207 F. Supp. 554, *aff'd*, 306 F.2d 489 (5th Cir.), *rev'd on retrial*, 212 F.Supp. 674 (1962). Seidenberg v. McSorley's Old Ale House, Inc., 308 F. Supp. 1253 (S.D.N.Y. 1969) James v. Ogilvie, 310 F. Supp. 661 (N.D. Ill. 1970); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967); Dobbins v. Local 212, International Bhd. of Electrical Workers, 292 F. Supp. 413 (S.D. Ohio 1968); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Meredith v. Allen County War Memorial Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968); Steele v. Louisville & N.R.R. Co., 323 U.S. 192 (1944).

But cf. "Students Rights" cases: Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968); Counts v. Voorhees College, 312 F. Supp. 598 (D.S. C. 1970); McLeod v. College of Artesia, 312 F. Supp. 498 (D.N.M. 1970); Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970).

See, Note *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1056-65 (1967-68); Note, *'State Action' and Private Universities*, 44 TULANE L. REV. 184 (1969-70); Note, *Private Government on Campus-Judicial Review of University Expulsions*, 72 YALE L. REV. 1362, 1381-1386 (1963); Note, *An Overview: The Private University and Due Process*, 1970 DUKE L. JOURNAL 795; Comment, *Student Due Process in the Private University: The State Action Doctrine*, 20 SYRACUSE L. REV. 911 (1969); Cohen, "The Private-Public Legal Aspects of Institutions of Higher Education." 45 DENVER L. REV. 643 (1968); O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1970); Schubert, *State Action and the Private University*, 24 RUTGERS L. REV. 323 (1969-70).

Yet, without further elasticizing of the "state action" concept, it is foreseeable that numbers of presently independent colleges will enter the public domain as economic considerations impel them to seek the public purse.

Even when the educationally sponsored discrimination is labeled "private," one may speculate whether it might still be reachable under the Civil Rights Act of 1866, as reenacted, through present section 1981 which provides:

> All persons . . . shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . .[60]

A line of cases has held that the Act reaches racial discrimination in private employment consistently with Congress' power to enforce the Thirteenth Amendment.[61] But women have also been subjected to a form of "involuntary servitude" in the nature of state imposed disabilities,[62] and it is not entirely frivolous to suggest that the removal of the "badges and incidents" of their *quasi*-chattel status is within the ambit of the Act.

While the protection of Negro rights was undoubtedly the motif of the legislation one court has found that the sweep of the provision is broad enough to encompass the safeguarding of the rights of white citizens against interference by black.[63] If, without doing violence to the statutory concept, we can infer that the rights conferred by section 1981 upon "all persons" were those enjoyed by "white *male* citizens," then the predicate may be formed for asserting the protection of the statute on behalf of women victimized by discrimination in private university employment.

The "Affirmative Action" Approach to Promoting Equal Employment Opportunity in Higher Education for Women Through the Federal Contract Compliance Program.

The twin problems of proof of violation and adequacy of remedy associated with the adjudicatory approach to sex discrimination inherent in the Civil Rights Acts of 1866 and 1964 have, to a significant degree, been finessed in the contrasting regulatory scheme for the promotion of equal opportunity embodied in the federal contract compliance program.

Under Executive Order No. 11246[64] as amended by Executive Order No. 11375[65] all federal contracting agencies are mandated to include in

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[60] 42 U.S.C. § 1981 (1965).

[61] Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1971); Dobbins v. Local 212, I.B.E.W., 292 F. Supp. 413 (S.D. Ohio 1968). *Cf.* Griffin v. Breckenridge, 39 U.S.L.W. 4688 (U.S. Sup. Ct. June 7, 1971) (§ 1985[3]); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (§ 1982); United States v. Medical Society of S.C., 298 F. Supp. 145, 152 (D. S.C. 1969); Young v. Int'l Tel. & Tel. Co., 438 F.2d 757 (3rd Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970).

[62] *See generally* L. KANOWITZ, *supra* note 19.

[63] Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969).

[64] 3 C.F.R. 339 (1964-1965); 42 U.S.C. §2000e (Supp. V, 1970).

[65] 3 C.F.R. 320 (1967).

government contracts provisions whereby the contractors, for themselves and their subcontractors, agree "not [to] discriminate against any employee or applicant for employment because of . . . sex" and to "take affirmative action to ensure that applicants are employed and that employees are treated . . . without regard to their . . . sex." [66] Responsibility for the enforcement of the program has been delegated by the Secretary of Labor to the Office of Federal Contract Compliance,[67] which, in turn, has sub-delegated major compliance functions for education to the Department of Health, Education and Welfare's Office of Civil Rights.[68] This year the Office is mandated to perform "reviews" on at least half of the facilities within its jurisdiction,[69] and, before the award, on every institution receiving a contract in excess of $1,000,000.[70]

Establishments entering into contracts calling for payment of more than $50,000 are required to submit detailed affirmative action plans outlining the procedures they will follow to end discriminatory employment practices and increase the representation of underutilized minority employees.[71] A formidable array of sanctions ranging from publicizing non-compliance to cancellation of existing awards and debarment from bidding on future contracts may be visited upon contractors failing to meet compliance standards.[72] With $3,367,000,000 of non-substitutable federal funds at stake annually,[73] some 2100 institutions of higher education are peculiarly sensitive to the imperatives of the Executive Order program. Yet the full potential of contract compliance as a means of promoting equal opportunity for professional women at our universities has not yet been realized.[74]

Three impediments need to be removed. The first of these is the lack of specific guidelines for educational institutions as to the content of affirmative action programs for elimination of sex discrimination in faculty and professional employment. To be sure, the OFCC has promulgated sex discrimination regulations useful in the typical industrial setting[75] but most of these—*e.g.*, including women in management training programs, designing advertising to indicate that women will be considered equally with men for jobs—are not very meaningful in the university personnel process.

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[66] 3 C.F.R. 321 (1967). The governors of 9 states have issued similar executive orders, *viz.*, Ala., Cal., Conn., Ill., N.J., Ohio, Utah, Wash., W. Va.

[67] 31 Fed. Reg. 6921 (1966).

[68] Compliance Agency Responsibility, OFCC Order No. 1 § 2b, 2 CCH EMPLOYMENT PRACTICES GUIDE ¶17,650 (Oct. 24, 1969). 15 contracting agencies have been given jurisdiction over specific industries pursuant to Standard Industrial Classification Codes designations. 41 C.F.R. § 60-1.6 (1970).

[69] *Id.* at § 2d.

[70] 35 Fed. Reg. 10,660 (1970), amending 41 C.F.R. § 60-1.20(d) (1970).

[71] 41 C.F.R. § 60-1.40 (1970).

[72] 3 C.F.R. 343-344 (1964-65), 42 U.S.C. § 2000e (Supp. V, 1970). These actions may be taken by the Office of Civil Rights only with the approval of the OFCC, 41 C.F.R. § 60-1.27 (1970).

Courts have refused to imply a private right of action for violation of the contractual pledge not to discriminate. Farkas v. Texas Instruments, 375 F.2d 629 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1968).

[73] *Hearings, Part I* at 3.

[74] Nash, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U. L. REV. 225, 231 (1971); Developments in the Law, *supra* note 37 at 1286-1289.

[75] 41 C.F.R. §§ 60-20.1—60-20.6 (1971).

The general orders governing employment policies of non-construction contractors toward minority groups[76] require, as part of an acceptable affirmative action program,[77] "an analysis of areas within which the contractor is deficient in the utilization of minority groups and . . . goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies. . . ." [78] Minorities are said to be "underutilized" in any job category in which the number of members employed is fewer than would reasonably be expected by their availability.[79] While the OFCC steadfastly denies that its guidelines countenance "compensatory hiring" or "employment quotas," [80] it does insist that "[w]here deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish . . . specific goals and timetables" which should be reasonably attainable in light of the deficiencies and his "good faith efforts to make his overall affirmative action program work." [81]

Specific numerical goals, expressed as percentages of each job category to be reached within given time periods, have been established on the basis of objective factors for the construction industry.[82] Failure to meet these targets constitutes evidence of discrimination, shifting to the contractor the burden of going forward on the question of compliance.[83] Apparently, however, the government retains the ultimate burden of showing that the contractor has not complied through lack of good faith efforts to achieve the set goals.[84] Although "merit based" hiring and promotion, presupposing neutrality of treatment, has been expressed to be the guiding principle,[85] the Solicitor to the Department of Labor has suggested that the contractor, "should strive to create the situation which would have prevailed in his establishment if not for the long history of discrimination against minorities by industry and society." [86] One may well question whether such a situation is either knowable or achievable, but attempts to create it are likely to involve, at least for the short term, a "compensatory" hiring and promotion system favoring minority group candidates disproportionately to their numbers thereby

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[76] 41 C.F.R. §§ 60-2.1—60-2.31 (1971) (OFCC Order No. 4).

[77] "An affirmative action program is a set of specific and result oriented procedures to which a contractor commits himself to apply every good faith effort." 41 C. F. R. § 60-2.10 (1971).

[78] 41 C.F.R. § 60-2.10 (1971).

[79] 41 C.F.R. § 60-2.11(a) (1971).

[80] 41 C.F.R. §§ 60-2.24(e), 60-2.30 (1971), *cf.* 42 U.S.C. § 2000e-2(j) (employer not required to grant preferred treatment to any group on account of "imbalance" in number of members of such group employed).

[81] 41 C.F.R. § 60-2.11(b) (1971).

[82] *E.g.*, 41 C.F.R. § 60-5.11 (1971) ("Washington Plan"); Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970).

[83] 41 C.F.R. § 60-5.21(f) (1971).

[84] *Id. cf.* 41 C.F.R. § 60-2.30 (1971).

[85] *See Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1300-01 (1971); 41 C.F.R. § 60-2.30 (1971).

[86] P. G. Nash, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U. L. REV. 225, 257 (1971).

colliding with the policies of Title VII.[87] While Title VII has limited application to institutions of higher education,[88] there would seem to be no need for affirmative action sex guidelines to sanction such "reverse discrimination." Short of this effective content can be supplied by requiring universities to take a number of steps to rid themselves of practices which bias the employment processes and give practical effect to their professed commitment to equal opportunity regardless of sex. For purposes of the present survey the major elements of such a program can be briefly stated:

1. Elimination of informal "quota" restrictions in admission of women to undergraduate, graduate, and professional schools and substitution of a policy of admission of females on the basis of competitive scholastic achievement.

2. Formulation and implementation of a plan for the active recruitment of women for both undergraduate and graduate schools with special emphasis upon encouraging women to enter traditionally male oriented professions.

3. Review of scholarship and financial aid programs to assure their availability to women, regardless of marital or parental status, and the adequacy of participation by women in the total of such awards.

4. Removal of age barriers in both admissions and financial assistance policies so as to encourage married women to resume their education as soon as their parental commitments permit them to do so, and, in this connection, establishment of child day care centers.

5. Expansion of student counselling and job placement services to accommodate the special needs of women.

6. Modification of any "nepotism" rules so as to restrict their operation to cases where the terms of employment, advancement or standards of conduct of one employee would be effectively subject to the authority of another related by blood or marriage.

7. Provision of adequate "maternity leave" time without loss of employment status or academic standing.

8. Payment of starting salaries and future increases according to clearly defined objective criteria consistently applied. When it is shown that the average compensation paid to women staff or faculty members is significantly less than that paid to men of equal rank and service in any appropriate class, the university should have the burden of presenting evidence indicating that the disparity is not the result of sex discrimination.

9. Placement of at least one woman on each recruitment, promotion and tenure committee according to an acceptable timetable.

10. Appointment of women to faculty and staff positions in accordance with specific numerical goals and timetables designed to result in a level of representation at the institution in each appropriate employment classification commensurate with the proportion of qualified women available in the relevant job market.

11. Creation of an effective internal administrative mechanism to (a) review university employment for adequacy of representation of

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[87] 42 U.S.C. § 2000e-2(a) (1964).

[88] *See* text at notes 20-27, *supra*.

women (b) investigate apparent disparities and inequities (c) appraise existing systems and procedures for making the admission, recruitment, financial aid, hiring, promotion and tenure decisions, in terms of their freedom from sex-bias and (d) recommend additional steps for assuring full equality of employment opportunity for women.

The second barrier to realization of the potential of the federal contract compliance program as a means of ending sex discrimination on the campus is the familiar one of inadequate agency resources in light of the agency mission.

At this time approximately 45 staff members of the HEW's office of Civil Rights, divided between Washington and 10 regional centers, carry the responsibility for investigating the compliance status of institutions of higher education.[89]

The Chicago Regional office whose jurisdiction extends to private and public colleges in the states of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin has had only one investigator to perform scheduled compliance reviews and investigate complaints.[90]

As this article is being prepared only two college affirmative action programs—those of Harvard and Tufts—attempting to provide equal employment opportunities for women have been approved although many elements in other submitted plans may be acceptable. Furthermore, the absence of a central clearing house and information exchange system has resulted in a lack of coordination and uniformity of approach among the regional headquarters so that there is no assurance that a college developed program deemed satisfactory by one branch will be similarly viewed by another.[91]

The need for an increased budget to hire additional investigators and the establishment of an inter-office communications network are understood by the agency[92] and progress to remedy these problems can be expected. However, there seems to be little doubt that universities take advantage of the limited staff available to enforce OFCC guidelines to drag their feet in the development of adequate affirmative action programs.[93] The efforts of the staff to achieve compliance could be materially assisted by focusing the force of public opinion upon recalcitrant institutions.[94] Unfortunately, however, the Department takes the position that its "letters of findings" and the university's responses thereto are confidential and unavailable to the public under the Public Information

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89 Telephone interview with Mrs. Rose Block, Senior Contract Compliance Specialist, Office of Civil Rights, Department of Health, Education and Welfare, Washington, D. C., on May 27, 1971.

90 Telephone interview with Mr. Don Scott, Acting Branch Chief, Chicago, Office of Civil Rights, Department of Health, Education and Welfare on June 10, 1971. Some 30 complaints over alleged sex discrimination at 20 institutions have been received by this office. Reviews under the sex guidelines have been undertaken in the Chicago region at 7 universities—Wisconsin, Pittsburgh, Michigan, Notre Dame, Loyola of Chicago, Illinois and John Carroll.

91 *Id.* The progress reports thus far filed by Harvard and Tufts have not been deemed satisfactory.

92 Telephone interview with Mrs. Rose Block, *supra* note 89.

93 Telephone interview with Mr. Don Scott, *supra* note 90.

94 *Id.*

Act as "investigatory files compiled for law enforcement purposes" thereby introducing a third obstacle in the path of the agency mission.[95] There would appear to be little justification for so classifying these documents[96] and perhaps a pending review of Department policy in this regard will overturn the restriction.

With all its limitations, it seems certain that the federal contract compliance program will in the near term prove to be a powerful instrument for reforming currents of rampant sexist employment practices in higher education.

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[95] Telephone interview with Mr. Robert Smith, Acting Director, Public Affairs Division, Office of Civil Rights, Department of Health, Education and Welfare, Washington, D. C., on June 15, 1971. *See* 5 U.S.C. § 552 (Supp. III 1968), 45 C.F.R. § 5.77 (1971).

[96] Bristol-Myers Co. v. F.T.C., 424 F.2d 935 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970).